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No. 89-1397

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In the Supreme Court of the United States

OCTOBER TERM, 1989

HUMBERTO SERGIO GARZA, GARY BEN JORDAN AND NOE MUNIZ, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court erred in refusing to grant a mistrial based on the prosecutor's closing argument.

2. Whether the district court erred in refusing to grant a mistrial based on an indirect attempt at jury tampering.

3. Whether 18 U.S.C. 3013, which directs sentencing courts to impose monetary assessments on all defendants convicted of federal offenses, was enacted in violation of the Origination Clause of the Constitution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3-10) is reported at 887 F.2d 55.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1989. A petition for rehearing was denied on November 27, 1989 (Pet. App. 11-12). The petition for a writ of certiorari was filed on February 26, 1990 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on one count of conspiracy to make false statements to a federally licensed firearms dealer, in violation of 18 U.S.C. 371, and on multiple counts of aiding and abetting the making of such false statements, in violation of 18 U.S.C.

924(a).[1] Each petitioner was sentenced to five years' imprisonment on the conspiracy count, a consecutive term of five years' imprisonment on one of the substantive counts, and concurrent five-year terms on each of the remaining substantive counts.[2] Each petitioner was also fined $1,000 on each count of conviction. A special assessment of $50 was imposed under 18 U.S.C. 3013 on selected counts of conviction.[3]

1. Petitioners were employees of a federally licensed firearms dealer, the Riverview True Value Home and Family Center, in Roma, Texas. They were authorized to sell weapons on behalf of the store. The evidence at trial showed that petitioners engaged in a conspiracy to sell numerous firearms, particularly assault rifles, without proper record-keeping. Petitioners paid persons to sign Part A of a federal firearms form (ATF Form 4473) in blank. That allowed petitioners to complete the form in a manner that would disguise the identity of the true purchaser of the firearm. Gov't C.A. Br. 5-13.

2. During trial, one of the jurors told the judge that she had been told by a friend that a court spectator had mentioned that the juror could "make a lot of money" if she would "turn for the other side." Gov't C.A. Br. 18. The court questioned the juror in chambers and confirmed that there had been no actual attempt at a bribe, and that the matter had not affected the juror's impartiality in any way. Each of the other jurors was questioned about the matter,

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[1] Petitioner Garza was convicted on 20 counts of violating 18 U.S.C. 924(a); petitioner Jordan was convicted on 17 counts; and petitioner Muniz was convicted on 18 counts.

[2] All but 537 days of each of petitioners' prison sentences was suspended.

[3] Petitioner Garza was fined $21,000 and specially assessed $550; petitioner Jordan was fined $18,000 and specially assessed $550; and petitioner Muniz was fined $19,000 and specially assessed $500.

and each said that his or her impartiality had not been affected. All members of the panel were retained as jurors. The court denied motions for a mistrial based on this incident. *Id.* at 18-21.

The prosecutor, during his rebuttal closing argument, responded to the closing argument made by counsel for defendant Moraida, who is not one of the petitioners. The prosecutor said:

> Mr. Ramirez indicated that there was not enough evidence from which any jury could convict the defendant, Moraida, and that if any jury convicted him, they would be convicting an innocent man. I am here to assure you that if there were not sufficient evidence, Judge Vela would have directed a verdict of acquittal * * *.
>
> * * * * *
>
> Were there not sufficient evidence, which if you believe it to be true, could support a verdict of guilty in this case, the matter would not be before you * * *.

Pet. App. 4-6. The district court responded to an objection to this comment by instructing the jury to disregard comments by counsel that differed from the court's instructions. *Id.* at 5. Later, the court instructed the jury that the court expressed no opinion about the guilt or innocence of any defendant. *Id.* at 9. The court denied petitioners' motions for a mistrial based on the prosecutor's comment.

3. The court of appeals affirmed. Pet. App. 3-10. The court ruled that the improper comment by the prosecutor during closing argument was harmless error. The court reached that conclusion by considering the prejudicial effect of the prosecutor's statements, the court's curative instruction, and the evidence of petitioners' guilt. *Id.* at 8-10.

See generally *United States* v. *Iredia*, 866 F.2d 114, 117 (5th Cir.), cert. denied, 109 S. Ct. 3250 (1989).

Petitioners had briefed the jury-tampering issue and their claim that the special assessment statute, 18 U.S.C. 3013, violates the Origination Clause. The court of appeals resolved those claims by stating: "We have examined the other contentions raised by the [petitioners] and conclude that they do not merit discussion." Pet. App. 10.

ARGUMENT

1. Petitioners renew their contention (Pet. 23-31) that the prosecutor's remarks in closing argument required the court to declare a mistrial. Petitioners devote much of their discussion to the claim that the prosecutor's remarks were inappropriate. But the court of appeals agreed with petitioners that the prosecutor's argument was error, and we do not contest that conclusion. The only issue, therefore, is whether the court of appeals correctly held that the prosecutor's remarks were harmless beyond a reasonable doubt.

Petitioners' suggestion (Pet. 28) that a prosecutor's comments before the jury cannot be harmless error is belied by this Court's decision in *United States* v. *Hasting*, 461 U.S. 499 (1983). In that case, the Court held that a prosecutor's improper remarks about the defendant's failure to testify were harmless. *Id.* at 510-512. Likewise, the court of appeals in this case properly found that the prosecutor's remarks were harmless beyond a reasonable doubt. As the court noted, the prosecutor's remarks pertained to a defendant other than petitioners. See Pet. App. 8. Moreover, the trial court instructed the jury that, contrary to the prosecutor's implication, the judge did not have a personal opinion about the defendants' guilt or innocence. In light of the substantial evidence of petitioners' guilt, therefore, the

court of appeals was correct in ruling that the prosecutor's statements were harmless. *Id.* at 10.

2. Petitioners also contend (Pet. 31-34) that the apparent indirect attempt at jury tampering required a mistrial. That contention is mistaken. After the possible attempt to influence the jury was brought to the trial court's attention, the court conducted the appropriate fact-finding inquiry required by *Remmer* v. *United States*, 347 U.S. 227 (1954). The trial court credited the statements of each juror that he or she could render a fair and impartial verdict. Gov't C.A. Br. 19-21. And the court of appeals properly held that the trial court's findings were not clearly erroneous. Thus, no further review of that fact-specific claim is warranted.

3. Finally, petitioners maintain (Pet. 22-23) that the special assessment statute, 18 U.S.C. 3013, is unconstitutional and that they therefore should not have to pay the special assessments imposed in this case. They argue that the special assessment statute is a bill for raising revenue that originated in the Senate, in violation of the Origination Clause of the Constitution, Art. I, § 7, Cl. 1. That issue is now before the Court in *United States* v. *Munoz-Flores*, No. 88-1932 (argued Feb. 20, 1990). The resolution of that case will likely govern the proper disposition of the special assessments imposed in this case. Accordingly, the Court should hold this petition until it decides *Munoz-Flores*.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *United States* v. *Munoz-Flores*, No. 88-1932, and disposed of in light of that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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